



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5 and 7

[FAC 2022-01; FAR Case 2019-003; Item II; Docket No. 2019-0029; Sequence No. 1]

RIN 9000-AN86

Federal Acquisition Regulation: Consolidation and Substantial Bundling

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 that requires providing public notices of determinations for substantial bundling and consolidation of contract requirements.

DATES: Effective **[Insert date 30 days after date of publication in the *FEDERAL REGISTER*]**.

FOR FURTHER INFORMATION CONTACT: Ms. Dana Bowman, Procurement Analyst, at 202-803-3188, or by email at dana.bowman@gsa.gov. For information pertaining to status or publication schedules, contact the Regulatory

Secretariat Division at 202-501-4755. Please cite FAC 2022-01, FAR Case 2019-003.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 85 FR 23299 on April 27, 2020, to implement section 863 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92, codified at 15 U.S.C. 644(e)(3) and 15 U.S.C. 657q(c)(2)) and the Small Business Administration (SBA) implementing regulations. SBA published a final rule to implement section 863 on November 29, 2019, at 84 FR 65647.

Section 863 requires public notification of an agency's determination to substantially bundle or consolidate contract requirements. Specifically, publication of a notice is required when the head of a contracting agency determines that an acquisition plan for a procurement involves substantial bundling of contract requirements. The head of the contracting agency must publish a notice on a public website that such determination has been made not later than 7 days after making the determination. Any solicitation for a procurement related to the acquisition plan may not be published earlier than 7 days after such notice is published. A justification for the determination must be published with the solicitation. The justification must

address the specific benefits anticipated, any alternative approaches, impediments to participation by small business concerns as prime contractors, and actions designed to maximize participation of small business concerns as subcontractors (see 15 U.S.C. 644(e)(3)(A) through (C)).

Section 863 also requires publication of a notice when the senior procurement executive (SPE) or chief acquisition officer (CAO) makes a determination that an acquisition strategy involving consolidation of contract requirements is necessary and justified under 15 U.S.C. 657q(c)(2)(A). The SPE or CAO must publish a notice on a public website that such determination has been made not later than 7 days after making the determination. Any solicitation for a procurement related to the acquisition strategy may not be published earlier than 7 days after such notice is published. A justification for the determination must be published with the solicitation. The justification must include the information in 15 U.S.C. 657q(c)(1)(A) through (E).

As a result, this final rule amends FAR 7.107-5, Notifications, to require the publication on the Governmentwide Point of Entry of a notice of substantial bundling or of a notice of consolidation, as required in the SBA final rule. This section also contains references to the required content of the consolidation determination

(at FAR 7.107-2) and the substantial bundling determination (at FAR 7.107-4).

Four respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments received and any changes made to the rule as a result of the public comments are provided as follows:

A. Summary of Significant Changes from the Proposed Rule

There are no significant changes made to the final rule.

B. Analysis of Public Comments

1. Support for the rule

Comment: One respondent expressed support for the rule.

Response: The Councils acknowledge the respondent's support for the rule.

2. More time between publication of notice and solicitation issuance

Comment: Two respondents expressed concern about the 7-day notification period, stating that it is not enough time for small businesses to plan and strategize. The

respondents requested the notification posting period be extended for a longer time, at least 2 weeks.

Response: This FAR rule uses the same time period set forth in SBA's implementation of section 863 after SBA considered the length of the notification period.

3. Location of notices

Comment: One respondent suggested that the existing requirement to publish the notification on a "public site" is too vague and that compliance could be satisfied by posting on an agency's social media platform. The respondent recommends that all notifications should be posted on *beta.sam* via the Governmentwide point of entry (GPE).

Response: This rule implements section 863 of the NDAA for FY 2016 (Pub. L. 114-92) and the SBA implementing regulations (13 CFR 125), which requires agencies to provide public notices on the GPE of determinations for substantial bundling and consolidation of contract requirements. FAR 7.107-5(b)(1) currently requires annual publication on the agency website of a list of bundled contracts and rationale, because section 1312 of Public Law 111-240 requires it. Thus, this rule could not mandate that all notifications be published on SAM via the GPE.

Additionally, the FAR text is amended at 7.107-5(c) and 7.107-5(d) to require the Senior Procurement Executive or Chief Acquisition Officer to publish notifications of

consolidation and substantial bundling of contract requirements in the GPE not later than 7 days after making such a determination and prior to issuance of the solicitation. The FAR does not use social media as a publication platform. No changes were made to the FAR text as a result of this comment.

4. Broader applicability of notice requirement

Comment: One respondent questioned why the required notification did not apply to all bundled procurements. The respondent further stated that the definition for substantial bundling should be referenced to provide guidance to the procurement office.

Response: This rule implements section 863 of the NDAA for FY 2016 (Pub. L. 114-92) and the SBA implementing regulations, which require publication of notices when a procurement involves consolidation or substantial bundling of contract requirements. The definition for substantial bundling can be found at 7.107-4(a)(1). Neither section 863 nor the SBA regulations altered notification requirements for bundled procurements below the substantial bundling threshold; therefore, this final rule does not apply these requirements below the substantial bundling threshold.

5. Outside the scope of the rule

Comment: One respondent questioned whether information is being withheld from the proposed rule. Another respondent stated that SBA procurement center

representatives often disagree with the bundling justification but sign form 2579 despite their opposition. The respondent further stated that small business subcontractors are not being utilized by large businesses given that there is "no punishment for a large not subcontracting" and no incentive for large businesses to comply with subcontracting goals beyond their initial proposal submission. Additionally, the respondent stated that bundling has been prohibited in Federal acquisition and recommends the following actions:

- Allow small businesses to be involved in the "crafting of bundling efforts" given that "large [businesses] are involved in the crafting of the bundling effort;" and
- Give SBA the "power to do their jobs" by allowing for a process for the procurement center representative to disagree with the bundling effort.

Response: The respondents' comments are outside the scope of this FAR rule. The Councils note that FAR 19.502-8 addresses the process for SBA PCRs to appeal the contracting officer's rejection of SBA's recommendation.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-shelf (COTS) Items

This rule does not create new solicitation provisions or contract clauses or impact any existing provisions or clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, this rule was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the "Submission of Federal Rules Under the Congressional Review Act" form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. The Office of Information and Regulatory Affairs (OIRA) in the

Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601-612. The FRFA is summarized as follows:

This rule is necessary to implement section 863 of the National Defense Authorization Act for 2016 (Public Law 114-92, codified at 15 U.S.C. 644(e)(3) and 15 U.S.C. 657q(c)(2)), and the Small Business Administration (SBA) implementing regulations. Section 863 requires the head of a contracting agency to publish a notice on a public website within 7 days of making the determination that an acquisition plan involves a substantial bundling of contract requirements. Additionally, section 863 requires the senior procurement executive or chief acquisition officer to publish a notice on a public website that consolidation of contract requirements is necessary and justified. For substantial bundling and for consolidation, the agency may not issue the solicitation any earlier than 7 days after publication of the notices described above. The agency must also publish the justification along with the solicitation. The objective of this rule is to amend the FAR to require that a notice of substantial bundling or of a notice of consolidation be published on the Governmentwide Point of Entry, as required in the SBA final rule. This section also contains references to the required content of the consolidation determination (at FAR 7.107-2) and the substantial bundling determination (at FAR 7.107-4).

No public comments were received in response to the initial regulatory flexibility analysis.

This rule may have a positive economic impact on any small entity that is interested in participating in Federal procurement. By posting justifications and notices of upcoming procurements that are planned to be substantially bundled or consolidated, small business concerns are made aware of potential subcontracting opportunities and possibilities for participating in joint ventures or small business teaming arrangements, which will help small businesses increase their competitiveness. The System for Award Management shows 315,655 entities that are small business concerns under at least one North American Industry Classification System code.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for any small entities.

There are no known significant alternative approaches to the rule that would meet the stated objectives of the applicable statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of SBA.

VII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

List of Subjects in 48 CFR Parts 5 and 7

Government procurement.

William F. Clark,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR parts 5 and 7 as set forth below:

1. The authority citation for 48 CFR parts 5 and 7 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 5—PUBLICIZING CONTRACT ACTIONS

2. Amend section 5.205 by revising paragraph (g) to read as follows:

5.205 Special Situations.

* * * * *

(g) *Notifications to the public regarding consolidation, bundling, or substantial bundling.* (1) For the requirement to publish a notification of consolidation or substantial bundling of contract requirements, see 7.107-5(c) and (d).

(2) The agency is encouraged to provide notification of the rationale for any bundled requirement to the GPE before issuing the solicitation of any bundled requirement (see 7.107-5(b)).

PART 7—ACQUISITION PLANNING

7.105 [Amended]

3. Amend section 7.105 by removing from paragraph (b)(16) the term "GPE" and adding "Governmentwide point of entry (GPE)" in its place.

7.107-1 [Amended]

4. Amend section 7.107-1 by removing from paragraph (a) the phrase "7.107-3 and 7.107-4" and adding "7.107-3, 7.107-4, and 7.107-5" in its place.

7.107-2 [Amended]

5. Amend section 7.107-2 by—

a. Removing from paragraph (a) introductory text the phrases "senior procurement executive" and "chief acquisition officer" and adding "senior procurement executive (SPE)" and "chief acquisition officer (CAO)" in their places, respectively;

b. Removing from paragraph (b) the phrases "senior procurement executive or chief acquisition officer" and "subsection" and adding "SPE or CAO" and "section" in their places, respectively;

c. Removing from paragraph (d) (3) the phrase "senior procurement executive or chief acquisition officer" and adding "SPE or CAO" in its place;

d. Removing from paragraph (e) (1) introductory text the word "subsection" wherever it appears and adding "section" in its place;

e. Removing from paragraph (e) (1) (i) the word "subsection" and adding "section" in its place; and

f. Removing from paragraph (e) (2) (i) the phrase "senior procurement executive" and adding "SPE" in its place.

6. Amend section 7.107-5 by—

a. Revising paragraph (b);

b. Redesignating paragraphs (c) and (d) as paragraphs (e) and (g) and adding new paragraphs (c) and (d) and paragraph (f); and

c. Removing from the newly redesignated paragraph (g) "*Public notification*" and adding "*Notification to public*" in its place.

The revision and additions read as follows:

7.107-5 Notifications.

* * * * *

(b) *Notification to the public of rationale for bundled requirement.* The agency is encouraged to provide notification of the rationale for any bundled requirement to the GPE, before issuance of the solicitation (see 5.201).

(c) *Notification to the public of consolidation of contract requirements.* The SPE or CAO shall publish in the GPE—

(1) A notice that the agency has determined a consolidation of contract requirements is necessary and justified (see 7.107-2) no later than 7 days after making the determination; the solicitation may not be publicized prior to 7 days after publication of the notice of the agency determination; and

(2) The determination that consolidation is necessary and justified with the publication of the solicitation. See 7.107-2 for the required content of the determination.

(d) *Notification to the public of substantial bundling of contract requirements.* The head of the agency shall publish in the GPE—

(1) A notice that the agency has determined that a procurement involves substantial bundling (see 7.107-4) no later than 7 days after such determination has been made; the solicitation may not be publicized prior to 7 days after the publication of the notice of the determination; and

(2) The rationale for substantial bundling with the publication of the solicitation. The rationale is the information required for inclusion in the acquisition strategy at 7.107-4(b) .

* * * * *

(f) *Annual notification to the public of the rationale for bundled requirements.* The agency shall publish on its website a list and rationale for any bundled requirement for which the agency solicited offers or issued an award. The notification shall be made annually within 30 days of the agency's data certification regarding the validity and verification of data entered in the Federal Procurement Data System to the Office of Federal Procurement Policy (see 4.604) .

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